Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)
EMR Network Petition for Inquiry To Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation	)

ORDER

Adopted: July 28, 2003 **Released: August 14, 2003**

By the Commission: Commissioner Copps issuing a statement.

INTRODUCTION

1. By this action, we deny the Application for Review[1] filed by the EMR Network ("EMR"), contesting the decision of the Chief, Office of Engineering and Technology ("OET") to dismiss EMR's Petition for Inquiry.[2] EMR had requested that we initiate a proceeding to gather information and opinion about the need to revise our regulations for radiofrequency ("RF") radiation and use the information so obtained to revisit our current guidelines for evaluating human exposure to RF emissions from transmitters under the jurisdiction of the Commission. We find that OET was correct in dismissing the petition, having determined that this

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[1] We consider herein both the Application for Review filed by EMR Network and its Supplement to that application.

[2] Letter from Bruce A. Franca to James R. Hobson, December 11, 2001 ("Dismissal letter").

Commission is not the most appropriate forum to initiate such an inquiry or proceeding concerning the environmental effects of RF radiation at this time.

BACKGROUND

2. Pursuant to the National Environmental Policy Act of 1969 (NEPA)[3], the Commission has established guidelines for human exposure to radiofrequency ("RF") radiation.[4] These guidelines, first established in 1985[5], regulate the amount of RF radiation to which humans may be exposed by various transmitters regulated by the FCC. The guidelines and methods for evaluating the environmental effects of RF have been revised as scientific knowledge in the area has advanced and standards-setting bodies upon which the Commission relies in setting its exposure guidelines have revised their maximum acceptable exposure criteria. The current guidelines were finalized in 1997, based on the recommendations and advice of federal agencies and groups with expertise in health-related areas and in standards setting.[6] More recently, the Commission updated its procedures for measuring RF exposure from mobile and portable devices.[7]

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[3] 42 U.S.C. §§ 4321 *et seq.* (1976).

[4] 47 C.F.R. §§ 1.1307(b), 1.1310, 2.1091, and 2.1093.

[5] *Report and Order* in GEN Docket 79-144 (*RF Report and Order I*), 100 F.C.C. 2d 543 (1985); *Memorandum Opinion and Order* in GEN Docket 79-144, FCC 85-467, released August 22, 1985, 58 RR 2d 1128 (1985).

[6] *Report and Order* in ET Docket No. 93-62 (*RF Report and Order II*), 11 FCC Rcd 15123 (1996); *Second Memorandum Opinion and Order and Notice of Proposed Rule Making* in WT Docket No. 97-192 and ET Docket No. 93-62, 12 FCC Rcd 13494 (1997).

[7] Public Notice, *Office of Engineering and Technology Announces Release of Revised Supplement C to OET Bulletin 65*, DA 01-1557, June 29, 2001; Public Notice, *Office of Engineering and Technology Announces a Transition Period for the Phantom Requirements of Supplement C to OET Bulletin 65,* DA 02-1438, June 19, 2002.

These procedures are based on the work and recommendations of an expert group of the Institute of Electrical and Electronics Engineers (IEEE).[8]

3. In its petition for inquiry, EMR requested that the Commission initiate a proceeding to gather information and opinion about the need to revise our regulations regarding human exposure to RF radiation. It further requested that the Commission use the information obtained in such an inquiry to revisit the guidelines currently established for evaluating human exposure to RF emissions from FCC-regulated transmitters. EMR observed that the Commission's current RF limits are several years old, and asserted that there are a number of studies which purport to demonstrate a health hazard from RF radiation that is not contemplated in our rules. In particular, EMR argued that non-thermal effects and the effects of long-term low-level exposure were not taken into consideration in setting the Commission's RF exposure guidelines. EMR supported its request by reference to a letter written by members of the Radiofrequency Interagency Working Group (IWG), an *ad hoc* group of scientific professionals from various federal agencies that have jurisdiction over or interest in various radiofrequency issues, to the Risk Assessment Working Group of the IEEE.[9] In that letter, at the request of the IEEE, the members of the IWG identified issues which they suggested should be addressed in considering revisions to IEEE's RF exposure guidelines.

4. OET dismissed EMR's petition, noting that in developing rules to implement health and safety related concerns, this Commission has historically relied on agencies with

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[8] The IEEE Standards Coordinating Committee 34, Subcommittee 2 is convened specifically to develop procedures for evaluating the Specific Absorption Rate ("SAR") of RF emissions from wireless handsets.

[9] Letter from W. Gregory Lotz, Ph.D. to Mr. Richard Tell, June 17, 1999 (Lotz letter).

primary expertise and responsibility for ensuring health and safety, such as the Environmental Protection Agency ("EPA") and the Food and Drug Administration (FDA). It observed that the current exposure guidelines are derived from criteria established by the National Council on Radiation Protection and Measurements (NCRP) and the IEEE, as further informed by the advice of the EPA, FDA, and other health and safety agencies. It noted that the adequacy of the Commission's RF exposure guidelines had been recently upheld, in the face of arguments similar to those advanced here by EMR, by the Second Circuit Court of Appeals.[10] OET concluded that a determination of whether the RF safety limits should be revised is, at least initially, more properly the jurisdiction of such agencies, and accordingly dismissed the petition.

DISCUSSION

5. EMR argues that OET failed to state the grounds for its action or to explain the conflicts of that action with law, precedent, and policy. EMR principally argues that the Commission cannot defer the responsibility for its rules to others and that the Commission has initiated action with regard to establishing its RF exposure guidelines in the past, contrary to OET's assertion in its dismissal letter that the Commission relies on other agencies and should not now take the initiative in this area. EMR contends that while the Commission states its reliance on other expert agencies in determining appropriate RF exposure guidelines, OET ignored a letter from the staffs of those agencies in rendering its decision.[11] It questions whether the Commission should rely on the IEEE, which it refers to as a private, commercial body dominated by private commercial interests, for developing RF exposure standards, contending that the other agencies upon which the

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[10] *See Cellular Phone Task Force v. FCC*, 205 F.3d 82 (2d Cir., 2000).

[11] EMR refers to the Lotz letter, *supra*.

Commission would rely for guidance in this area variously lack the resources or the interest to participate or to "push back" on the work or recommendations of the IEEE. In a Supplement to its Application for Review, EMR cites the lack of response from other health and safety agencies to which it sent inquiries regarding this matter.[12] EMR distills its argument into a claim that current RF bioeffects research is privately orchestrated, and thus not credible. It concludes by citing the "Recommendations for Executive Action" of a May 2001 Report by the Government Accounting Office[13], in which GAO recommends that the FCC Chairman direct OET to issue revised guidance on SAR testing procedures, and to consult with FDA on the method of incorporating measurement uncertainty in determining compliance with RF safety limits, as further evidence of a need to conduct such an inquiry.

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[12] With its Supplement, EMR submits letters from a staff member of the Environmental Protection Agency (Letter from Norbert Hankin to Ms. Janet Newton, July 16, 2002, "EPA letter"), the Director of the National Institute of Environmental Health Sciences at the National Institute of Health (Letter from Kenneth Olden, Ph.D to Ms. Janet Newton, February 21, 2002, "NIH letter"), the Acting Director of the Centers for Disease Control and Prevention at the National Institute for Occupational Safety and Health (Letter from Kathleen M. Rest, Ph.D, M.P.A. to Ms. Janet Newton, April 2, 2002, "NIOSH letter"), and the Assistant Secretary for Occupational Safety and Health at the U.S. Department of Labor (Letter from John L. Henshaw to Ms. Janet Newton, May 10, 2002, "OSHA Letter"). These letters were sent to EMR in response to its solicitation from these agencies of support for an inquiry into current RF health-related research and the adequacy of the FCC's current RF exposure guidelines. EMR apparently did not receive responses to similar letters from the Food and Drug Administration or the National Telecommunications Information Agency.

[13] GAO Report to Congressional Requesters, *Research and Regulatory Efforts on Mobile Phone Health Issues*, GAO-01-545, May, 2001, at 31-32.

6. We find that, contrary to EMR's assertions, the OET action does not conflict with pertinent law or regulation, and we hereby affirm its decision to dismiss EMR's Petition for Inquiry. OET's fundamental premise — our reliance on the expertise of health and safety agencies in this area — is our sound guiding principle, and EMR has failed to advance any argument that persuades us otherwise.[14]

7. EMR relies primarily on the Lotz letter to support its contention that there are areas of insufficiently explored concern regarding the health effects of human exposure to RF radiation. We agree that in this letter, knowledgeable individuals appropriately identified issues of potential interest in setting RF exposure guidelines. These ideas had been solicited by another working group of experts convened to consider just such matters, the IEEE Risk Assessment Working Group. It is telling, however, that the letter specifically noted that it did not reflect the views of the respective agencies by which the individual IWG members are employed.[15] The IEEE Risk Assessment Working Group has taken these concerns under advisement, but has yet to determine what, if any, responsive action is appropriate. Moreover, not one of the agencies represented by the members of the IWG, whose views and formal actions are informed in part by these individuals and also by other individuals and sources, has elected to initiate any action which EMR can

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[14] This is not to say that this Commission could not or would not initiate action in the face of compelling evidence of a need for such action. But, where, as here, other more expert agencies have the same information as we have and do not see reason for action, as we further discuss below, it would be difficult for us to ignore the tacit conclusions of those agencies, absent a compelling case to do so.

[15] "The views expressed in this correspondence are those of the members of the Radiofrequency Interagency Work Group and do not represent the official policy of position of the respective agencies." Lotz letter, *supra*, at para. 2.

point to or of which we are otherwise aware in response to these issues.

8. EMR argues that by directing EMR's efforts to other agencies, the Commission seeks to be relieved of a responsibility that it cannot legally avoid. In making this argument, EMR suffers a critical misapprehension. As outlined above, this Commission has carefully and assiduously developed RF guidelines to protect the public according to the best science available, as interpreted by the agencies most expert in the pertinent fields. As aptly recognized by OET in reaching its determination to dismiss EMR's petition, we will continue to rely on just such expertise in evaluating the continued propriety of our RF guidelines. When there is an appropriate indication by such agencies, or other expert sources, whether self-initiated or in response to outside petition or activities, we could consider the need for an investigative effort in support of possible exposure rules revisions. We reiterate here OET's recognition that our RF exposure guidelines were recently upheld by the Court of Appeals.[16] In that decision, the Court specifically recognized that the "the FCC satisfied itself that there was a mechanism in place for accommodating changes in scientific knowledge.... [including scientific committees and ongoing research] ... 'and that it would 'consider amending [its] rules at any appropriate time if these groups conclude that such action is desirable.'" [17] This is precisely the posture that we continue to maintain, as illustrated by OET's decision.[18]

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[16] *Cellular Phone Task Force v. F.C.C.*, 205 F.3d 82 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

[17] *Id.*, at 90, 91.

[18] We note here that FCC staff continues to participate in the Federal Radiofrequency Interagency Working Group, which monitors developments related to RF biological effects, and in various IEEE committees and subgroups related to RF research, oversight, and standards setting. With this participation, among other means, the Commission stays

9. EMR attempts to undercut our reliance on this position by relating previous instances in which, it contends, the Commission acted on its RF exposure guidelines on its own initiative. Each of those instances, however, is inapposite to the present circumstances. EMR points out that the Commission's initial proceeding to establish RF exposure limits was commenced without input or specific encouragement from other agencies. At that time, however, the Commission, with no rules regulating human RF exposure, was compelled to undertake a rulemaking proceeding in order to comply with the provisions of the NEPA. When the American National Standards Institute (ANSI) and IEEE established guidelines in this area during the course of that proceeding, the Commission incorporated them into its proceeding, and they formed the basis for the rules eventually adopted.[19] In its more recent revision of RF exposure guidelines, also cited by EMR, the Commission significantly and explicitly relied on expert advice in forming the basis for its initiation of that action[20] and in reaching its conclusions regarding appropriate exposure levels.[21] EMR asserts that, in its reconsideration decision, the Commission in fact "dared to choose between two sets of recommended standards and between and among the conflicting view of other federal agencies themselves."[22] The point of this assertion seems to imply that we cannot now disclaim the ability or responsibility to make such decisions. Neither OET's decision nor our affirmation of that decision, however, would or should do so. OET's conclusion not to proceed with an inquiry on the basis of EMR's Petition,

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informed of studies and other information available, as well as the activities and opinions of other agencies pertinent to this area.

[19] *RF Report and Order I, supra* at 543.

[20] *RF Report and Order II, supra* at 15184.

[21] *Id.*

[22] EMR Application for Review at 8.

affirmed here, is not based on an unwillingness to choose among conflicting expert information and recommendation, but rather is based on the dearth of such information or recommendations. It is also illustrative of the propriety and effectiveness of our reliance on other experts to recognize that the most recent proceeding to revise our exposure rules was initiated in response to revisions in the ANSI/IEEE standards. We acted in response to the ANSI/IEEE revision explicitly to "reflect recent scientific studies of the biological effect of RF radiation" in order to "ensure that FCC-regulated facilities [would] comply with the latest safety guidelines for RF exposure."[23]

10. While EMR would question the impartiality of the IEEE itself and of the federal agencies and their personnel that participate in its committees and subgroups, the fact remains that IEEE, a nonprofit entity with members representing a variety of interests, including government, industry, and academia, is composed of leading experts in this area. There is no other comparable group of experts with which to consult or upon which to rely. Without the knowledge and views of such experts, credible guidelines and policy in this area cannot be formed. Despite EMR's implication that the IEEE is captive of the industry, it is important to note that membership in the subject committees and subgroups is open, permitting the government and academia to participate to the full extent they desire. Neither the FCC participants nor other government participants have determined that a bias controls or adversely affects the work or deliberations of the IEEE. We note that EMR's criticism of the IEEE is based on a journal article and emphasizes "early draft" proposals rather than final actions.[24] It is final actions, not early drafts, that are significant, and as a participant in the IEEE, we do

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[23] *RF Report and Order II, supra* at 15128.

[24] EMR Application for Review at n. 23.

not find this reference compelling. Moreover, IEEE is not the only source of expertise upon which this agency relies.[25] Also, while EMR decries the private funding for research in this field, research results are critically considered before they would form a basis for action. Moreover, one federal agency, the FDA, currently responsible for overseeing certain research funded by industry is apparently satisfied with that research's objectivity, and it is not our place to second-guess their position in this regard. Additionally, the federal government, through the National Toxicology Program of the National Institute of Environmental Health Sciences, is in the early stages of a long-term study of potential health effects from mobile phones that may provide a basis for future consideration of RF exposure limits. We note that this effort has been undertaken pursuant to a recommendation of the FDA. In sum, EMR's protestations regarding the adequacy of the IEEE or of current research to inform the fundamental decision as to whether and when to initiate a revision of the RF emission guidelines, are not sufficient to warrant an inquiry by this agency at this time.

11. While EMR correctly notes, in a related argument, that it must petition the Commission for changes in Commission's rules, it fails to discriminate what constitutes an adequate basis for pressing such a case. Were EMR to demonstrate reliable pertinent information developed by an appropriate agency or other expert source, we would have a basis for opening a rulemaking or fact-finding proceeding. In the absence of a demonstrable show of concern, or even

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[25] In establishing our most recent guidelines, we relied primarily on the recommendations of the NCRP and federal health and safety agencies. See, *RF Report and Order II*, *supra*. While EMR decries the withdrawal of the NCRP from this field, we note that the NCRP has recently decided to reconstitute its subcommittee that deals with RF exposure issues. The FCC is a collaborating organization of the NCRP. FCC staff also participates in international activities related to RF exposure, including those sponsored by the World Health Organization.

interest, by other expert agencies with the same (or greater) knowledge of research in this field — and its implications — as we possess, we are not inclined to generate such an inquiry on our own. Additionally, we do not have the prerogative to order other agencies to do so or to participate in an inquiry that this agency might initiate in spite of their better-informed inaction.

12. Finally, EMR, in its Supplement, points to letters it received in response to its own assertion of the inadequacy of our current rules and its solicitation of support for a Commission rule making, directed to six agencies and institutions.[26] As EMR recognizes in its Supplement, the agencies' responses clearly demonstrate the lack of interest on their part to initiate a proceeding or inquiry at this time.[27] EMR concludes from these responses that this Commission is compelled to action. We believe, however, that these responses affirm OET's determination that other more expert agencies, which are at least as well informed at the FCC, are not inclined to action at this time, and that there is no glaring flaw in their decision making and no compelling evidence of which we are uniquely aware that suggests to us that a rule making or inquiry is warranted at this time. We note, significantly, that these letters do demonstrate that some of

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[26] *See* n. 12, *supra*. According to its Supplement, only four of six agencies responded to EMR's solicitation.

[27] The EPA letter, *supra*, is an informal response by an individual without authority to speak for the agency, and merely reiterates information already in the record. The NIH letter, *supra*, indicates its intention to conduct laboratory research of the nature sought by EMR (which, we note, could form the basis for a recommendation for further inquiry or action). The NIOSH letter, *supra*, asserts that agency's past and continuing review of RF radiation bioeffects literature worldwide. The OSHA letter, *supra*, remarks that its interest is limited to the workplace (which is included in our RF exposure guidelines), and that it has and will continue to work with other agencies and professional organizations to monitor the possible health effects from RF exposure.

these agencies are continuing to monitor literature and conduct research in the area, which supports the premise upon which our own determination is based.

13. As an incidental matter, in response to EMR's assertions regarding the recommendations for Commission action in the 2001 GAO Report, we note that the Commission has, in fact, revised testing procedures for mobile and portable devices, as indicated in paragraph 2, above, and that OET staff and FDA staff have worked together on the matter of accounting for measurement uncertainty in testing for RF exposure, as reflected in the recent revisions to the on the joint FDA/FCC website on RF Safety (<www.fcc.gov/oet/rfsafety>). Each of these actions reflects the Commission's continuing involvement with other agencies in areas related to the regulation of RF exposure.

ORDERING CLAUSES

14. Accordingly, IT IS ORDERED That pursuant to Section 4(i) and 4(j) of the Communications Act of 1934, as amended (47 U.S.C. §§ 154(i), 154(j)), the Application for Review filed by EMR Network IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

RE: EMR Network Petition for Inquiry To Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation (Report and Order).

I write separately to stress that in this Order the Commission reaffirms its commitment to monitor developments related to the biological effects of RF energy. Should additional scientific evidence emerge, concerned parties should bring such evidence to our attention. Evidence of this type could mean that the Commission would have a "basis for opening a rulemaking or fact-finding proceeding."[1]

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[1] *Order* at ¶ 11.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 27, 2004 Decided December 7, 2004

No. 03-1336

EMR NETWORK,

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS

On Petition for Review of an Order of the
Federal Communications Commission

Whitney North Seymour, Jr. argued the cause for petitioner. With him on the brief was *James R. Hobson*.

Nandan M. Joshi, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *R. Hewitt Pate*, Assistant Attorney General, U.S. Department of Justice, *Catherine G. O'Sullivan* and *Andrea Limmer*, Attorneys, *John A. Rogovin*, General Counsel, Federal Communications Commission, *Daniel M. Armstrong*, Associate General Counsel, and *Joel Marcus*, Counsel.

Before: EDWARDS and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: A variety of facilities and products subject to Federal Communications Commission regulation, including towers and other facilities for radio, TV, and cell phone communications, and cell phones themselves, transmit radio signals — and with them radiofrequency ("RF") radiation. At certain levels RF radiation may have adverse "thermal" health effects, caused by heating human tissue. The Commission has issued regulatory guidelines based on its assessment of those effects.

Non-thermal effects are also of potential concern, but in its last review of its RF radiation guidelines the Commission declined to tighten its restrictions on that account. See *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 12 FCC Rcd 13494, 13505, ¶ 31 (1997). Its decision, resting on the scientific uncertainty about such effects and the costs of imposing restrictions without a clearer showing of effects, was upheld by the Second Circuit as within the Commission's discretion. See *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90-92 (2d Cir. 2000).

The year after the Second Circuit decision, EMR Network filed a petition asking the Commission to initiate an inquiry on the need to revise the regulations to address non-thermal effects. It relied principally on a letter from members of the Radiofrequency Interagency Work Group, which is made up of staff members from various federal agencies, including the FCC, and which studies the effects of RF radiation. Joint Appendix ("J.A.") 23. The letter, which didn't represent the official policy or position of member agencies, laid out a number of issues that the staff members believed "need to be addressed to provide a strong and credible rationale to support RF exposure guidelines." J.A. 22. The

letter expressly declined to assign priorities to the issues; and in no way did it sound the tocsin for new regulations. After the Office of Engineering & Technology rejected EMR's initial petition, but before the Commission ruled on the issue, EMR submitted several academic studies discussing potential health effects from exposure to RF radiation at levels lower than are currently permissible without additional environmental analysis. See 47 C.F.R. §§ 1.1306, 1.1307. The Commission affirmed the dismissal of EMR's petition, concluding that there was "no compelling evidence" that a rulemaking was warranted. *EMR Network Petition for Inquiry To Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation*, 18 FCC Rcd 16822, 16827, ¶ 12 (2003).

EMR now petitions for review of the Commission's order, arguing principally that the Commission has violated its duty under § 102 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, to ensure that agencies consider the environmental effects of their decisions. We affirm the Commission's order.

* * *

Section 102(2)(C) of NEPA requires a federal agency to prepare an Environmental Impact Statement ("EIS") as part of any "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In appropriate cases an agency can instead prepare an Environmental Assessment, followed by a Finding of No Significant Impact. See 40 C.F.R. §§ 1501.4(a)-(e); see also *Dep't of Transportation v. Public Citizen*, 124 S. Ct. 2204, 2209-10 (2004); *Sierra Club v. U.S. Dep't of Transportation*, 753 F.2d 120, 126 (D.C. Cir. 1985). Although the FCC had not prepared a formal EIS in making its latest revisions to its RF radiation rules, *Cellular*

Phone Taskforce held that it had "functionally" satisfied NEPA's requirements "in form and substance." 205 F.3d at 94-95.

EMR accordingly focuses on agencies' NEPA duties when new evidence turns up after completion of an EIS (or equivalent), citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). *Marsh* considered a claim that the Corps of Engineers had neglected its NEPA duties when, one third of the way through construction of a dam, it received information arguably suggesting that the dam would cause more severe environmental harm than had been supposed at the time the EIS had been completed and construction approved. Regulations require an agency to prepare a Supplemental Environmental Impact Statement when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(1)(ii), and the parties agreed that agencies were required to take a "hard look" at evidence suggesting that this standard had been met. *Marsh*, 490 U.S. at 370-74. The Court rejected plaintiffs' view that a reviewing court should examine the evidence afresh, ruling instead that the usual "arbitrary and capricious" standard should apply. *Id.* at 375-78. EMR suggests that the current circumstances are a "fair parallel" to those in *Marsh*. Petitioner's Br. at 36.

The FCC argues strenuously that it satisfied the "hard look" requirement, but we need not resolve that issue. In *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), the Court declined to apply *Marsh* where the federal action in question was approval of a land use plan. Unlike the dam in *Marsh*, that "action" was complete when the new information was received. *Id.* at 2384-85. Presumably later actions pursuant to the plan might be significant enough to require NEPA filings, just as some FCC actions relating to RF radiation will need new environmental

studies — including, for example, the circumstances where the current regulations call for such studies. But the regulations having been adopted, there is at the moment no "ongoing" federal action, *id.* at 2385, and no duty to supplement the agency's prior environmental inquiries.

Thus we review the Commission's rejection of EMR's petition as we would agency rejection of any petition to initiate a rulemaking. Such a decision is to be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). As applied to refusals to initiate rulemakings, this standard is "at the high end of the range" of deference, see *American Horse*, 812 F.2d at 4-5, and an agency refusal is overturned only in the "rarest and most compelling of circumstances," *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981).

EMR argues that the Commission's refusal to undertake a rulemaking constitutes an improper delegation of its NEPA duties to private organizations and government agencies. Indeed, in formulating its RF regulations, and in deciding whether to re-open the issue, the Commission has relied on other government agencies and non-governmental expert organizations with specific expertise on the health effects of RF radiation. See *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 8 FCC Rcd 2849, 2849, ¶ 1 (1993). EMR says this is improper, citing cases requiring that a federal agency maintain responsibility for the final conclusion of an EIS. See, e.g., *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (agency may not rubberstamp a consultant-prepared EIS); *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 960 (1st Cir. 1976); *Sierra Club v. Lynn*, 502 F.2d 43, 58-59 (5th Cir. 1974); see also *Communities Against Railway Expansion, Inc. v. FAA*, 355 F.3d 678, 686 (D.C. Cir. 2004).

The Commission appears not to have abdicated its responsibilities, but rather to have properly credited outside experts. It found that the Institute of Electrical and Electronic Engineers (a non-profit entity with members from government, industry, and the academy), and the "federal agencies and their personnel that participate in its committees and subgroups," are "composed of leading experts in this area," and that there was "no other comparable group of experts with which to consult or upon which to rely." 18 FCC Rcd at 16826, ¶ 10. EMR does not contest these propositions. In upholding the earlier decision not to tighten regulation on account of non-thermal effects, the Second Circuit rejected a claim that the Commission had improperly relied on expert standard-setting organizations. *Cellular Phone Taskforce*, 205 F.3d at 90. Moreover, as the Environmental Protection Agency is "the agency with primacy in evaluating environmental impacts," *id.* at 91, the FCC's decision not to leap in, at a time when the EPA (and other agencies) saw no compelling case for action, appears to represent the sort of priority-setting in the use of agency resources that is least subject to second-guessing by courts. See, e.g., *American Horse*, 812 F.2d at 4. Finally, the Commission's determination to keep an eye on developments in other expert agencies suggests that here, as in *Cellular Phone Taskforce*, the Commission has an adequate "mechanism in place for accommodating changes in scientific knowledge." 205 F.3d at 91.

In what is at a minimum in "tension" with its abdication claim, EMR asserts that the Commission has also violated its duty to coordinate with other federal agencies to facilitate NEPA's environmental goals. See 40 C.F.R. §§ 1500.5(b), 1501.1(b). In any event, the argument was not presented to the Commission and therefore we may not address it. 47 U.S.C. § 405; see also *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003).

EMR's submissions implicitly raise one of the strongest potential bases for overturning an agency's refusal to initiate a rulemaking — that "a significant factual predicate of a prior decision on the subject . . . has been removed." *WWHT*, 656 F.2d at 819; see also *American Horse*, 812 F.2d at 5; *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979). EMR suggests that the studies it submitted (after the decision of the Office of Engineering & Technology) show that exposure to RF radiation is unsafe at levels too low to cause thermal effects. But the articles submitted are nothing if not tentative. One, for example, hypothesizes a mechanism by which cell phone radiation might promote cancer, but also notes that "[t]o date, there is limited scientific evidence of health issues, and no mechanism by which mobile phone radiation could influence cancer development." Peter W. French et al., *Mobile Phones, Heat Shock Proteins and Cancer*, 67 Differentiation 93, 93 (2000). We find nothing in those studies so strongly evidencing risk as to call into question the Commission's decision to maintain a stance of what appears to be watchful waiting.

In its reply brief EMR tries to shore up its factual case by offering additional reports of possible non-thermal risks. As the reports were not submitted to the Commission before it acted, they cannot be a basis for overturning the order. 47 U.S.C. § 405; see also *AT&T Wireless Services, Inc. v. FCC*, 365 F.3d 1095, 1101 (D.C. Cir. 2004). The Commission's motion to strike one of these references is dismissed as moot.

As the Commission's decision not to initiate an inquiry neither violated NEPA nor was otherwise an abuse of discretion, the petition for review is

Denied.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1336 September Term, 2004

Filed On: February 11, 2005 [877431]

EMR Network,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk